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COURT OF APPEALS

STATE OF NEW YORK

ANDREW CAROTHERS, M.D., P.C.,

Appellant,

-against-

No. 39

PROGRESSIVE INSURANCE COMPANY,

Respondent.

20 Eagle Street
Albany, New York
May 1, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 39, Andrew Carothers
3 v. Progressive Insurance Company.

4 Counsel?

5 MR. LEDERMAN: Good afternoon and may it please
6 the court. My name is Bruce H. Lederman. I'd like to
7 reserve two minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. LEDERMAN: On this Law Day, it's particularly
10 appropriate to open by saying that a trial and the rules of
11 evidence are supposed to advance the search of truth,
12 search for truth, and provide for a fair trial. This case
13 is an example of where evidentiary rulings prevented a fair
14 trial. A bedrock principle of trial practice, which is
15 ensconced in the Pattern Jury Instructions is that
16 questions without answers are not evidence. Evidence is -
17 - -

18 JUDGE STEIN: Well, there certainly are some
19 circumstances under which the indication of the Fifth
20 Amendment privilege can be mentioned, can be used to
21 support a permissible inference. Obviously the question
22 here is a little different; it's about whether the
23 invocation by a nonparty can be used, right? But there - -
24 - there have been other courts that have grappled with this
25 issue and - - - and many of them have said that there are



1 circumstances in which it is permissible. Let's just
2 assume for the moment that that is the case. Why would
3 this not be such a case? For example, why was the
4 testimony of the invocation of the privilege not relevant
5 to the matter before the jury here, given the particular
6 circumstances of this case?

7 MR. LEDERMAN: Well, Judge Stein, that's exactly
8 the issue. The question that was asked, which is the
9 penult - - - not even the penultimate - - - the ultimate
10 question: "Mr. Sher, are you the owner?" "Fifth."

11 That does not have any probative value in this
12 case because it is more likely than not - - - and I submit
13 almost certainly likely that the reason the Fifth Amendment
14 was invoked was there's extensive reason to believe that
15 Mr. Sher and Ms. Vayman may have been guilty of tax
16 evasion, moving money offshore. There's evidence in the
17 record - - -

18 JUDGE GARCIA: Isn't that related to the issue,
19 in some way, because they're making a certain amount of
20 money off of this that they're not reporting?

21 MR. LEDERMAN: The plaintiff in this case is
22 Andrew Carothers, M.D., P.C. Even if Mr. Sher and Mr. Vay
23 - - - Ms. Vayman did something wrong, the question is: was
24 there, in the words of Mallela, a willful and material
25 violation of law by Andrew Carothers, M.D., P.C.?



1 At this point, although the briefs indicate that
2 this is not a fight over money, this is a fight over money
3 between insurance companies and Dr. Carothers. Dr.
4 Carothers testified he has - - - he does not owe any money
5 to Mr. Sher and - - - and Ms. Vayman. It is all Dr.
6 Carothers' money, the corporation's money.

7 JUDGE GARCIA: And certainly the jury's entitled
8 to hear that proof, but one, to go back to Judge Stein's
9 question, here it seems to me the question is: is this
10 relevant, and is there a reason why it shouldn't come in?
11 So I think what we were talking about was what's the
12 relevancy, what would the inference be here, right? So
13 other courts have looked at, among other factors, what's
14 the alignment of interest, right? And how is that not
15 relevant here?

16 MR. LEDERMAN: The interests are exactly
17 opposite. Dr. Carothers, who is the record owner and - - -
18 and the plaintiff in this case, he paid a certain amount of
19 money, there's no question, 577- or maybe 579,000 dollars a
20 month for renting three facilities. He was not working
21 with them, from his point of view. So it's bootstrapping.
22 That's the problem here. It becomes a classic example of
23 bootstrapping because Dr. Carothers would testify I didn't
24 - - - I owned the practice.

25 The question that was asked, referred to in the



1 opening, referred to in the summation: Mr. Sher, Ms.
2 Vayman, are you the owner, yes or no? Plead the Fifth.
3 There is an implication that a jury would draw, not lawyers
4 but a lay person - - -

5 JUDGE FAHEY: So let's assume that it was error.
6 The Appellate Term and the Appellate Division says that
7 error's harmless. The evidence seems strong here. Why is
8 it not overwhelming for fraudulent incorporation?

9 MR. LEDERMAN: The answer to that is this court's
10 decision in 1980 in the Marine Midland case. In 1980, this
11 court set the standard that the standard for harmless error
12 is no view of the evidence. If you read the Appellate
13 Division's decisions, it's quite clear that they used the
14 wrong standard of review. The Appellate Division said the
15 reason it's harmless error is, quote: "The evidence clearly
16 favored a verdict in defendant's favor." And maybe the
17 evidence favored, but that is not no view. The standard
18 set by this court in 1980 is no view. Evidence clearly
19 favoring is not no view.

20 JUDGE FAHEY: So you would - - -

21 MR. LEDERMAN: And the question - - -

22 JUDGE FAHEY: - - - argue that the standard in a
23 civil case then is higher than it would be for
24 constitutional error in a criminal case?

25 MR. LEDERMAN: Judge Fahey, I have not thought of



1 what the standard is in criminal cases. I can just say
2 that the standard set by this court is no view of the
3 evidence.

4 And the proper analysis was the analysis by Judge
5 Solomon in the Appellate Term where he said: "A reasonable
6 view of the evidence is that Dr. Carothers had bad business
7 judgment, was a poor manager who put too much trust in and
8 delegated too much authority to his manager, and was a
9 mediocre administrator, but nevertheless owned and
10 controlled the professional corporation."

11 You have a judge of the Appellate Term, who
12 reviewed the record, telling you that there is a view.
13 Perhaps the Appellate Division is right to say the evidence
14 strongly favored, but that is not the standard.

15 JUDGE RIVERA: But in many ways, you have to
16 suspend, kind of, reality to think that this is really just
17 poor judgment as opposed to full abrogation of any control
18 of the entity. I mean, he doesn't even know where the
19 money's going, he doesn't know when it's going. There's
20 large amounts being sent to off-shore accounts that's being
21 - - -

22 MR. LEDERMAN: There may - - -

23 JUDGE RIVERA: - - - used for personal interest.

24 MR. LEDERMAN: There may have been - - -

25 JUDGE RIVERA: He doesn't know who some of the



1 employees are.

2 MR. LEDERMAN: Well, Judge, I can tell you when
3 you purchase a turnkey operation - - - because he did. He
4 walked in, it was running well, he purchased it. I spoke
5 to Dr. Carothers - - -

6 JUDGE FAHEY: Well, do you contest those numbers,
7 though, the disparity that Judge Rivera refers to? He took
8 about, at the most, 200,000 dollars out in salary, but
9 there was 12.2 million funneled to various offshore
10 accounts, different corporations, various leases. Isn't -
11 - -

12 MR. LEDERMAN: But that - - -

13 JUDGE FAHEY: Let me just finish the thought.
14 Isn't that disparity striking?

15 MR. LEDERMAN: No, if you understand - - - and
16 this goes to - - - another error because if Dr. Carothers
17 had prevailed, there's another eighteen million dollars - -
18 -

19 JUDGE FAHEY: Well, I understand that.

20 MR. LEDERMAN: And he would have - - -

21 JUDGE FAHEY: But that doesn't go to the fraud
22 incorporation argument. That - - - that may go to another
23 argument. But I'm having a hard time seeing how that goes
24 to the fraudulent incorporation argument. So tell me about
25 the acts that were actually in the record, on the record,



1 in dispute, that disparity. How do you address that
2 disparity for us to say - - - how would you have us look at
3 it, I guess; that's what I'm asking.

4 MR. LEDERMAN: I would have you look at it, as
5 the record clearly shows, that Dr. Carothers had the
6 opportunity to acquire a business with three locations,
7 with rents, all in, of 175,000 for two of the locations,
8 195- for one, and he could have made a substantial profit,
9 and he would have made a substantial profit. And he was
10 denied a fair opportunity.

11 And again, I would go back to the question - - -
12 and I can see my - - -

13 JUDGE RIVERA: You're back to, yes, he could
14 purchase what you're calling this turnkey operation, but
15 the law is clear: he's got to be the one in control.

16 MR. LEDERMAN: And he was.

17 JUDGE RIVERA: And the facts weigh very heavily
18 in the other direction. I'm finding it very difficult. I
19 appreciate the dissent below, but I'm finding it very
20 difficult to say that that is not speculative.

21 MR. LEDERMAN: Well, it's a question based on
22 this court's standard that he had the right to have a fair
23 trial and have a jury make that determination. And yes,
24 could we sit and say the evidence - - - and this is what
25 the Appellate Division said - - - strongly favors one view.



1 Yes, but at the same time Dr. Carothers, before you have
2 forfeiture - - - and I see my time is up, but I request - -
3 -

4 CHIEF JUDGE DIFIORE: You may - - -

5 MR. LEDERMAN: - - - a few more minutes to - - -

6 CHIEF JUDGE DIFIORE: - - - complete your answer.

7 MR. LEDERMAN: - - - address and go into the
8 Mallela issue. Dr. Carothers had a right to have a jury
9 determine this. And he was deprived of the right to have a
10 fair trial in this.

11 Now, there overarching this is the question of
12 this court's decision in Mallela in 2005. Mallela, what it
13 says, and this becomes very important - - - the third
14 paragraph from the end, if you read what the actual
15 decision says is: "We hold, on the strength of this
16 regulation, carriers may look beyond the face of licensing
17 documents to identify willful and material failure".

18 Now, willful and material, we submit, is a fraud
19 standard. The jury charge here was essentially a piercing-
20 the-corporate-veil charge. It's almost identical to what
21 you'd see in Morris v. Tax Commission (ph.) of consider
22 these factors.

23 And what it's missing, if you have piercing the
24 corporate veil, you have to - - - in just a normal context,
25 you have to show both complete domination and also that



1 domination was used to commit a fraud. In Mallela, using
2 the holding of Mallela, which requires a willful and
3 material violation, the charge should have asked the jury:
4 do you find that Dr. Carothers willfully and materially, or
5 with fraudulent intent, violated the law? And this becomes
6 very important.

7 I cited a case, 2010 case by this court, which is
8 very significant: Glassman v. ProHealth. In that case,
9 there was a situation where Dr. Glassman, who was an
10 anesthesiologist, had a contract with an AmSurg Center to
11 provide anesthesia services. His contract had an
12 additional provision that said: if I work off site, I'll
13 split the revenues with you.

14 The Appellate Division Second Department found
15 that that contract to share - - - to share the revenues
16 from offsite work was illegal, the exact same argument
17 that's made here. The AmSurg center had a license to only
18 do surgery at a certain center. So if Dr. Glassman was
19 working off site sharing revenues, the Appellate Division
20 said that's illegal and dismissed the counterclaim.

21 That came up to this court. This court said, and
22 I believe it's incredibly relevant here: "Forfeitures by
23 operation of law, in the context of forfeitures for alleged
24 violations of medical regulation, are disfavored, and
25 allowing parties to escape their contractual obligations



1 will not be permitted."

2 And what this court said, and I submit it's
3 directly relevant, is that it was a malum prohibitum
4 violation. There was not anything inherently evil, not
5 anything malum in se about splitting revenues in a certain
6 way. And they said, as a result, that this court
7 reinstated the counterclaim by the AmSurg center against
8 Dr. Glassman in that case.

9 JUDGE FAHEY: Can I stop you for a second? The
10 way I understand the Mallela ruling is Judge Rosenblatt
11 wrote there that we're talking here about fraud in the
12 corporate form, not in - - - in the sense of traditional
13 common-law fraud. And that's what Mallela involved, and
14 it's arguably what this case involves.

15 And I understood your argument to be that the
16 language that Judge Rosenblatt used there, referring to the
17 fraud or the actions as tantamount to fraud, supported your
18 theory that it was akin to that and that the charge was
19 therefore error, and that was the - - - the source of the
20 error.

21 MR. LEDERMAN: Well, yes, but I'll take it
22 further, Judge Fahey, that if you look at his decision
23 where he says what we hold, this is what the actual holding
24 of the case was that requires willful and material failure
25 to abide. So what - - - this is why there has to be



1 something tantamount to fraud. You don't necessarily need
2 a common-law fraud charge. But you need a charge to ask
3 the jury to determine did Dr. Carothers act with fraudulent
4 intent, or did he willfully and materially, in the words of
5 Judge Rosenblatt, fail to abide by state and local law so
6 that if the jury - - - and this was the point I was making
7 with Glassman; the way you harmonize the two decisions is
8 there has to be more than simply an inadvertent or possibly
9 even - - -

10 JUDGE FAHEY: Well, that's true.

11 MR. LEDERMAN: - - - negligent failure.

12 JUDGE FAHEY: That's true. I think you're right
13 about that. There does have to be more than a mere
14 technical violation. And I assume that was the purpose and
15 it's, arguably, the purpose that the court set out a number
16 of factors which, in and of themselves, may not have been
17 sufficient, but in combination, in totality, may have been
18 sufficient. And that's what we have to look at.

19 MR. LEDERMAN: But what's missing from the charge
20 to make it consistent with Glassman, to make it consistent
21 with the actual holding of Mallela is to charge the jury:
22 to find fraudulent incorporation, you must find that Dr.
23 Carothers acted with some fraudulent intent, or to use the
24 words "tantamount to fraud", using the words of the
25 decision, acted with willful - - - willful means



1 intentional. And so there has to be that. And then, in
2 considering that, you can consider these thirteen factors.
3 That's what harmonizes it with the piercing-the-corporate-
4 veil doctrine.

5 JUDGE RIVERA: Yeah, the problem is the language
6 that's actually in the case where the court is talking
7 about behavior that's tantamount to fraud, it says
8 "tantamount"; it doesn't say fraud, which would be really
9 what you're arguing. But the examples of "technical
10 violations will not do" don't suggest anything about fraud.
11 And so one would think, if they're trying to somehow draw
12 the kind of distinction you're talking about, they might
13 have been more express in the way they - - - they
14 structured that particular - - -

15 MR. LEDERMAN: Well - - -

16 JUDGE RIVERA: - - - response.

17 MR. LEDERMAN: Judge Rivera - - -

18 JUDGE RIVERA: But I know your light is on, so -
19 - -

20 MR. LEDERMAN: Okay.

21 JUDGE RIVERA: Your light is red.

22 CHIEF JUDGE DIFIORE: Thank you, Mr. Lederman.

23 MR. LEDERMAN: I reserve two minutes. Thank you.

24 CHIEF JUDGE DIFIORE: Counsel?

25 MR. LEVY: Good afternoon, Your Honors. May it



1 please the court. Barry Levy for Progressive Insurance
2 Company and the other insurers who are the respondents in
3 this case.

4 JUDGE STEIN: Do you agree that - - - that the
5 conduct of the incorporator here has to be willful conduct,
6 whatever that means?

7 MR. LEVY: No, we don't agree at all with that,
8 nor does the superintendent of insurance, Your Honor. If
9 you read the amicus brief that the superintendent filed in
10 this case, what the superintendent clearly said was we
11 enacted the regulation to deter the very types of
12 activities that went on in this type of case because Doc-
13 in-the-box schemes, which is what this exactly was, creates
14 the problem where benefits that are available to people can
15 be improperly siphoned off.

16 JUDGE STEIN: But doesn't even that presume some
17 level of intentionality?

18 MR. LEVY: It - - - it presumes some materiality
19 to the violation, Judge Stein. And the distinction which
20 Judge Rivera, from the language that she read, is exactly
21 the distinction that the trial judge and every judge to
22 have reviewed this case, has drawn in this case, and
23 correctly so.

24 What we're talking about here are things that go
25 to the indicia of control or ownership. So the examples in



1 Mallela, such as failing to hold a meeting, failing to make
2 a filing, those are ministerial acts that don't go to the
3 heart of the control and operation test. In contrast, in a
4 case like this, where you had evidence that, from the very
5 get-go, the doctor entered into a series of - - - what are
6 essentially, you know, ridiculous leases to siphon off the
7 profits - - -

8 JUDGE RIVERA: Isn't it a point well taken on his
9 side, doesn't he have an argument that what Mallela is - -
10 - is talking about is, yes, technical violations which may
11 not be intentional, you know, a little negligence there,
12 but it's like bad judgment, you're a bad manager, and
13 that's what Mallela's saying. That's not what you're
14 talking about. We're not talking about bad management.

15 MR. LEVY: We're not talking - - -

16 JUDGE RIVERA: And all he's arguing is: can't
17 you look at this evidence and let the jury then decide
18 whether or not he was just a terrible, terrible manager?

19 MR. LEVY: Well, Your Honor, let me draw two
20 points onto that. First of all, in terms of Mr. Lederman's
21 argument regarding the Appellate Division applying the
22 wrong standard, I would point the court to the decision
23 where the court says: "However, given the evidence adduced
24 at trial, the error could not have affected the outcome of
25 the trial and was thus harmless." That's clearly the



1 application of the no-evidence standard regardless of what
2 the court may have otherwise said.

3 But when you look at the magnitude of the
4 evidence here, Your Honor, there is no conclusion that can
5 be drawn from the trial record in this case that this was a
6 situation where a doctor made a bad judgment. One of the
7 things that Mr. Lederman said which I found quite
8 interesting is the fact that Dr. Carothers acquired - - -
9 he acquired a practice. Well, he didn't acquire it from
10 anybody. He entered into a - - -

11 JUDGE STEIN: Aren't there two aspects to this,
12 in a sense, in terms of whether you could say it was bad
13 judgment? One is the financial aspect of what he paid and
14 what he was paid. That's one. The other is the - - - the
15 control aspect of it which is who was controlling - - - you
16 know, who was controlling how the business was being
17 operated, right? So - - -

18 MR. LEVY: Dr. Carothers controlled nothing. He
19 didn't control the clinical aspect of the practice; the
20 testimony is clear about that. He didn't control the
21 financial aspect of the practice. The testimony is clear
22 for - - -

23 JUDGE STEIN: So I guess my question is: even if
24 we agree that he was just a bad business person, or if the
25 jury could have reasonably found that, does that - - - does



1 that end the inquiry?

2 MR. LEVY: But that's exactly the argument that
3 he made to the jury, and the jury found that that wasn't
4 accepted. The jury found, on the strength of the evidence
5 - - - and by the way, the majority of the evidence in this
6 case came from Dr. Carothers' mouth, either in the form of
7 the deposition that he gave prior to trial or during the
8 cross-examination that lasted almost four days.

9 JUDGE WILSON: So let me try and vary Judge
10 Stein's question a little bit. Suppose that Sher and
11 Vayman have fraudulent intent and they dupe Carothers.
12 What's the result?

13 MR. LEVY: Same result, Your Honor, and the
14 reason is is that this is - - - we're dealing here with a
15 regulation that relates to eligibility. If a - - - if a
16 licensing law is violated, and regardless of whether
17 there's intent, the health care provider is not entitled to
18 payment.

19 The superintendent of insurance, in the most
20 recent amicus brief, which reaffirms what it said back in
21 2005, establishes that it has made a public policy
22 decision. That public policy decision is that we are not
23 going to allow this type of behavior to exist regardless of
24 whether there is scienter, intent, or criminal conduct.
25 And that is for the regulator to decide in the context of



1 the no-fault system. And - - - and Judge, it's not decided
2 in a vacuum. Think about the magnitude of the problems
3 that exist in the context of the operation of this practice
4 and the lack of clinical control.

5 One of the things that the Department say in its
6 brief, which is key, is we're concerned about patient care.
7 In this particular case the evidence was overwhelming that
8 nobody cared about the patients. The only thing that the
9 practice - - - and I use that term in the - - - in the form
10 - - - the only thing that the practice cared about was
11 getting people in, getting the scans done, getting the
12 bills out. The screening procedures didn't exist. The
13 protocols for doing the scans didn't exist. Dr. Carothers
14 didn't even know if the equipment was maintained. I mean,
15 we're not talking about using can openers here. We're
16 talking about pieces of equipment that have the ability to
17 - - -

18 JUDGE FAHEY: How many scans did he participate
19 in?

20 MR. LEVY: Seventy-nine.

21 JUDGE FAHEY: And how many were there?

22 MR. LEVY: 38,000. And by the way, the seventy-
23 nine that he claims to have read, he didn't really read
24 them; he double read them. In other words, they had been
25 read by another radiologist previously, and for whatever



1 reason, he felt that he needed to read them.

2 But going back to your point, Judge Stein, I want
3 to address the financials.

4 JUDGE RIVERA: Well, how many would he have to
5 read? Does he have to read any?

6 MR. LEVY: I think he has to have a role - - -

7 JUDGE RIVERA: To have control.

8 MR. LEVY: I think to have control - - -

9 JUDGE RIVERA: He has to read them himself?

10 MR. LEVY: I don't think he has to read them all,
11 Judge Rivera. I think - - -

12 JUDGE RIVERA: No, I didn't say that. Does he
13 have to read any?

14 MR. LEVY: I think he has - - -

15 JUDGE RIVERA: He otherwise controls exactly what
16 goes on. He knows where the money goes, he sets those
17 protocols, he hires and fires employees. Does he have to
18 read - - -

19 MR. LEVY: I would say if he had all the
20 protocols in place to assure that there were - - - there
21 was quality medical care, and he had - - - he had the last
22 word, okay, in the context of medical practices that exist,
23 in today's day and age, the doctors who are - - - are - - -
24 at the top of the food chain, they don't do everything
25 themselves. We know that, okay? But they do things. They



1 understand where their bank accounts are. They don't give
2 that away to someone that they met for ninety minutes.

3 What legitimate owner - - - and this is something
4 that's very important from the trial record - - - what
5 legitimate owner would sign a lease to commit himself to
6 twelve-and-a-half to fifteen million dollars and
7 simultaneously sign a restrictive covenant that says he
8 can't compete with his own business?

9 JUDGE RIVERA: So I take it from you he - - - he
10 cannot delegate these crucial aspects of how - - - how
11 these three different places were run.

12 MR. LEVY: He can delegate certain things as long
13 as he ultimately has control and responsibility for those
14 types of things. So administrative tasks - - -

15 JUDGE RIVERA: If we don't accept that rule, do
16 you still win?

17 MR. LEVY: I still win.

18 JUDGE RIVERA: Okay. What's the alternative
19 basis for the win?

20 MR. LEVY: The alternative - - -

21 JUDGE RIVERA: If we don't accept the rule you
22 just articulated.

23 MR. LEVY: The alternative basis for the win is
24 if you look at the totality of the circumstances that exist
25 in this particular case, there is no view of this record



1 from which this court can conclude that he was in control
2 or that he legitimately owned the practice. Because there
3 are - - - other than the fact that his name was on the
4 paperwork, other than that fact, there was no indicia of
5 ownership.

6 The profits which are supposed to go to the owner
7 of the practice, they all went to Sher and Vayman. The bank
8 accounts which are supposed to be in control, they all went
9 to Sher and Vayman. Vayman is the only sole signatory on
10 the bank account. She was the only person who could
11 actually take a loan from the lender. She's the only
12 person who had the ability to sign paychecks.

13 All the things that Dr. Carothers did are things
14 that employees do, not things that owners do. Employees
15 sign restrictive covenants in favor of their employers.
16 Employees show up to their place of business every Friday
17 to get their paycheck. Employees are the ones who get a
18 salary and don't get profits.

19 CHIEF JUDGE DIFIORE: Counsel, do you care to
20 address the admission of the nonparty deposition?

21 MR. LEVY: Yeah, I would briefly, Your Honor. As
22 Judge Stein correctly said, a very unique set of
23 circumstances here. And the reason, one, that it's such a
24 unique set of circumstances is essentially what you had
25 here is a conspiracy. You had a conspiracy, essentially,



1 at its core, between the lay people and the licensed
2 professional, all right, to violate the practice of
3 medicine. And they acted in concert with one another.

4 So although the law - - - and again, this court,
5 to my knowledge, has never spoken on this particular issue,
6 so we are writing somewhat on a clean slate. And we don't
7 think it's necessary to get to the ultimate conclusion
8 here. But in the unique set of circumstances here, all of
9 the interests were aligned.

10 JUDGE STEIN: Well, but don't they have a point
11 when they say that - - - that it was kind of bootstrapping
12 that the - - - the very issue was who was in control. And
13 the question that was asked and to which they pled the
14 Fifth - - - one of the - - - one of the many questions was
15 that very question. So isn't that a little bit circular?

16 MR. LEVY: I don't think it's circular because
17 ultimately, at the end of the day, you're dealing with
18 people who, at the time this was all going on, were all one
19 and the same. Each played their own part. They were
20 indistinguishable from one another. No one part in this
21 particular - - - within the scope of the corporation, could
22 have completed what took place here without the
23 participation of the other.

24 JUDGE FAHEY: But assuming it was there, what's
25 the basis for arguing that it was harmless?



1 MR. LEVY: Very easy. When you look, Your Honor,
2 at the - - - at the mountain of evidence versus that - - -
3 the Fifth - - - Fifth Amendment invocation, we're talking
4 about two, two-and-a-half hours' worth of testimony, in the
5 context of a seventeen-day trial, lasting five weeks, in
6 which there were so many facts that were undisputed.

7 JUDGE FAHEY: Well, there could be one question
8 that - - - that could - - - that could have a negative
9 effect. So that isn't, in and of itself, dispositive. The
10 real question is - - - is the evidence on the other side
11 and how overwhelming it is.

12 MR. LEVY: There's virtually no evidence on the
13 other side of the - - - the insurer's position here because
14 Dr. Carothers' acknowledgments and his admissions during
15 the course of his deposition and during the course of the
16 trial - - - he knew the leases weren't fair market value.
17 He knew he had given up control to the bank account.

18 He knew that - - - and by the way, the things
19 about - - - that happened, the - - - the 2.3 million
20 dollars that went across the ocean, all of that he knew
21 about. He never said, oh, by the way, these people have
22 taken advantage of me. He was all part and parcel. This
23 is all evidence that came out of his mouth, Your Honor.
24 This isn't a question of where we're looking at a close
25 case. This isn't even close to a close case.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. LEVY: Thank you, Your Honor.

3 CHIEF JUDGE DIFIORE: Counsel?

4 MR. LEDERMAN: Dr. Carothers testified at the
5 trial that he supervised the medical profession, medical
6 work here. He testified that he went around to all the
7 facilities. He testified that he reviewed Dr. Chess' work
8 and believed it to be outstanding.

9 JUDGE FAHEY: Let me ask you this. Is there any
10 financial evidence that you would point us to look at that
11 would favor your point of view that this was not a
12 fraudulent incorporation? What would you have us look at
13 in terms of the - - - the finances?

14 MR. LEDERMAN: The testimony of the expert - - -
15 and the numbers are really very simple that if you pay
16 577,000 dollars a month, in all, in costs to run a practice
17 which will make 1.3 million dollars a month. And the
18 numbers may sound large, but keep in mind the State of New
19 York sets the rates. Those are the rates. The facility is
20 capable of doing large volume of scans.

21 JUDGE FAHEY: That's not my question. I want you
22 to stay on my question. My question is: what financial
23 evidence do you want us to look at that favors your
24 client's point of view that this was not a fraudulent
25 corporation? I quoted figures to you before, 12.2 million



1 taken out by Sher and Vayman. He got a salary worth about
2 110,000 dollars a year. What would you have us look at
3 that says, no, that's wrong, financially?

4 MR. LEDERMAN: What's wrong there, and what the
5 judge didn't allow in is, had we prevailed.

6 JUDGE FAHEY: No, I understand your eighteen-
7 million argument. Setting that aside, evidence that's for
8 the time period in question, during the incorporation, tell
9 me what I should look at.

10 MR. LEDERMAN: You should look at that there was
11 an amount that Dr. Carothers knew he was paying which is
12 exactly what you - - - sometimes when you have a business,
13 you have to pay your creditors before you take your own
14 salary. And that's exactly what happened here. And it
15 became - - - as bootstrapping to say because you weren't
16 paid - - - because the insurance companies, all fifty-three
17 - - -

18 JUDGE FAHEY: But if that's the case then isn't
19 the argument then that the creditors were in control of the
20 business and not the doctor?

21 MR. LEDERMAN: Creditors are in control of the
22 business the same way the bank owns my house. I bought my
23 house in 2006 before the market went down. At some - - -
24 at a point in time my house was under water; I had no
25 equity in it.



1 JUDGE STEIN: Doesn't that get us sort of back to
2 the fact that he - - - he could have - - - you call this
3 his turnkey operation, and I have a little hard time
4 understanding what the benefit of the turnkey operation is
5 if it costs many multiples of what he could have set it up
6 for himself, and then he wouldn't have all these creditors
7 and he could just pay himself and make as much if not more
8 money.

9 MR. LEDERMAN: Well, respectfully, that's not
10 correct, Judge Stein.

11 JUDGE STEIN: Okay.

12 MR. LEDERMAN: To set up a facility like this, if
13 there was evidentiary - - - there was expert testimony,
14 costs millions of dollars to set up a facility like this.
15 You have - - -

16 JUDGE STEIN: But there was a lot of testimony
17 that said you could lease all of this equipment for far
18 less than - - - or you could buy it - - - and rent or buy
19 it and make payments on it for far less than what he paid -
20 - - what he was paying to lease.

21 MR. LEDERMAN: But that's a very simple analysis
22 of sometimes the whole is greater than the sum of the parts
23 because to operate an MRI facility you have to have real
24 property that will accommodate 28,000-dollar machines, a
25 whole set up. So when he looked at it, Dr. Carothers had



1 the opportunity without - - - when he didn't have
2 substantial capital of his own, to acquire the practice,
3 which would generate significant income. And there's
4 nothing wrong - - - a lot of real estate people do it - - -
5 with buying property without money. That's what he did.
6 He had an opportunity that he could acquire something which
7 but for the insurance company were not paying.

8 JUDGE RIVERA: Sure, I get that argument that
9 there is a ready, on-the-ground business, you can just buy
10 and fall right in. I understand that part of the argument.
11 That argument really is not so much that. It's that next
12 question of when he did that, were those really his
13 businesses.

14 MR. LEDERMAN: They were and that's - - -

15 JUDGE RIVERA: That's the bottom line. Does he
16 really control them which is - - -

17 MR. LEDERMAN: That's where we - - -

18 JUDGE RIVERA: Your argument would be more
19 compelling if the point is that yes, I buy a business
20 that's ready to go or a practice - - - a medical practice
21 that's ready to go and then it's my medical practice. I
22 assume all the duties and responsibilities and control of
23 that practice. That's - - - that's where we are.

24 MR. LEDERMAN: And that's what Dr. Carothers
25 testified happened. That's what he had a right to have a



1 jury determine, and then you come - - -

2 JUDGE RIVERA: What about his argument that that
3 argument was made and the jury rejected it?

4 MR. LEDERMAN: Well - - -

5 JUDGE RIVERA: What are you seeking that you have
6 not already gotten?

7 MR. LEDERMAN: The jury was - - - you've got to
8 understand, the insurance company started the trial by
9 saying you're going to hear the Fifth to the question: "Do
10 you own it?" They ended, at page 2944 of the record,
11 asking the jury, at the end of a very lengthy summation,
12 read to the jury the question: "Are you the owner of
13 Andrew Carothers, M.D., P.C.?" "Fifth."

14 This court, and I submit, Judge Solomon, in the
15 Appellate Term, was correct: we cannot substitute any of
16 our collective judgments for what a jury would have found
17 in a fair trial. And I would submit, and we did discuss,
18 we're writing on a clean slate.

19 The First Department and the Third Department
20 have said simply the rule of law should be that the Fifth
21 Amendment privilege cannot be invoked with an adverse
22 inference from a nonparty. I submit that should be the
23 rule of law adopted by this court.

24 I don't - - - and even if the court follows the
25 Second Circuit's Libutti's decision, for reasons that I



1 talk about, this case would not fall into it, in my brief.
2 But this case is an important case that the court should
3 set the standards and remind the Appellate Division that
4 the standard is no view. You've still got to go back and
5 look at what the Appellate Division said. They said the
6 evidence clearly favors. But that goes back to your right
7 to a jury trial.

8 That's why this court's decision in Marine
9 Midland was correct that unless there is no view, may not
10 be the best view, but unless there's no view, you're
11 depriving someone of their right to a fair trial.

12 And as I started, this is ultimately - - - and
13 the whole purpose of trials and rules of evidence is to
14 find the truth. And it was distorted in this case because
15 of the use of the Fifth Amendment and because of the lack
16 of any instruction regarding the element of willfulness
17 that this court, in 2005, in Judge Rosenblatt's decision,
18 said was an element of Mallela to require forfeiture.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MR. LEDERMAN: Thank you, Your Honors.

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Andrew Carothers, M.C., P.C. v. Progressive Insurance Company, No. 39, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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